NO: 88-1573

Supreme Court, U.S.
FILED
MAR 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1988

RODRIGO ALONSO, ET AL.,
PETITIONERS

v.

LEO'S QUALITY FOODS, ET AL.,
RESPONDENTS

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Should the Supreme Court resolve the three-way split among the Courts of Appeals regarding whether gross negligence violates a union's duty of fair representation?

2. Was summary judgment wrongly granted below on Petitioners' claim for breach of the duty of fair representation where the record evidence would support a jury's finding of gross negligence, but not intentional misconduct, with respect to Respondent Union's failure to file a timely grievance protesting Petitioners' mass discharge?

PARTIES TO THE PROCEEDING

Petitioners are the 33 natural persons who were Plaintiffs-Appellants below, namely: Rodrigo Alonso, Maria Alonzo, Francisco Barba, Jose Becerra, Hector Benavides, Antonia Burciaga, Francisco Burciaga, Adalberto Castellanos, Agustin Castellanos, Melecio Chavez, Alejandro Espinoza, Andrea Fregoso, Carrie Herbert, Antonio Lemus, Angel Lopez, Gerardo Lopez, Cristina Lozano, Efrain Lujan, Filiberto Martinez, Johnnie Mae Matheny, Pascasio Medina, Marcelino Moya, Beatrice Orkis, Juventino Picasso, Jose Ramirez, Arturo Rodriguez, Luis Rodriguez, Carmen Salazar, Rosa Lee Sullivan, Luis Torres, Guillermo Valencia, Gerardo Velez, and Mariano Zayas.

Respondent (Defendant-Appellee below) is United Food and Commercial Workers Union, Local 770 (formerly United Food and Commercial Workers Union, Local 274).

All other persons who were originally party to the lawsuit were dismissed in the District Court.

TABLE OF CONTENTS

QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
1. Introduction	3
2. The Mass Terminations	4
3. The Potential Grievances	7
4. Time Limit for Grievances	9
5. The Union Assumes Responsibility for Filing Timely Grievances	10
6. Union President Instructs Union Attorney to Investigate and Report Back ... then Goes on Vacation while the Grievance Deadline Expires	11
7. Proceedings in District Court	13
8. Proceedings in Ninth Circuit	15

REASONS FOR GRANTING THE WRIT 19

1. The Circuits Are Badly Split. 19

a. Seventh Circuit. 20

b. Plurality View. 21

c. Ninth Circuit. 24

d. Need for Supreme Court Guidance 25

2. Millions of Employees Currently Have No Remedy for Their Unions' Gross Negligence. 26

3. The Case at Bar Is a Good Vehicle for a Clarifying Supreme Court Decision 28

CONCLUSION 34

TABLE OF AUTHORITIES

Cases

Adams v. Budd Co., 846 F.2d 428 (7th Cir. 1988), *cert. denied*, 109 S.Ct. 791 (1989) — 21

Bowen v. United States Postal Service, 459 U.S. 212 (1983) — 25-26

Bressette v. Int'l Talc Co., Inc., 527 F.2d 211 (2d Cir. 1975) — 8n10

DeArroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970) — 22

Dement v. Richmond, Fredericksburg & Potomac Railroad Co., 845 F.2d 451 (4th Cir. 1988) — 22

Griesmann v. Chemical Leaman Tank Lines, 776 F.2d 66 (3d Cir. 1985) — 21

Harris v. Schwerman Trucking Co. 668 F.2d 1204 (11th Cir. 1982) — 24

Local No. 381, IUOE v. Tosco Corp., 823 F.2d 265 (8th Cir. 1987) — 8n10

Local Lodge No. 1266, IAM v. Panoramic Corp., 668 F.2d 276 (7th Cir. 1981) — 8n10

Miami Foundry Corp. v. NLRB, 682 F.2d 587 (6th Cir. 1982) — 6n7

Moore v. Bechtel Power Corp., 840 F.2d 634 (9th Cir. 1988) 25

Nursing Home & Hospital Union No. 434 v. Sky Vue Terrace, Inc., 759 F.2d 1094 (3d Cir. 1985) 8n10

Parker v. Connors Steel Co., 855 F.2d 1510 (11th Cir. 1988) 20,24

Ruzicka v. General Motors Corp., 707 F.2d 259, 260 (6th Cir.), *cert. denied*, 464 U.S. 982 (1983) 23

Smith v. Hussman Refrigerator Co. 619 F.2d 1229 (8th Cir. 1980) 23

Smith v. Local 7898, United Steelworkers of America, 834 F.2d 93 (4th Cir. 1987). 23

Thomas v. Bakery, Confectionery and Tobacco Workers Union 433, 826 F.2d 755 (8th Cir. 1987), *cert. denied*, 108 S.Ct. 1019 (1988) 23-24

United Food & Commercial Workers Int'l Union v. NLRB, 768 F.2d 1463 (D.C. Cir. 1985) 6n7

Vaca v. Sipes, 386 U.S. 171 (1967) 1,19

Warehousemen's Union Local No. 206 v. Continental Can Co., 821 F.2d 1348 (9th Cir. 1987) 8n11

Williams v. Sealand Corp., 844 F.2d 17 (1st Cir. 1988) 22

Wyatt v. Interstate & Ocean Transport Co., 623 F.2d 888 (4th Cir. 1980) 23

Statutes

National Labor Relations Act
Sec. 9(a), 29 U.S.C. Sec. 159(a) 2
Sec.10(b), 29 U.S.C. Sec. 160(b) 7n9

Labor-Management Relations Act
Sec. 301(a), 29 U.S.C. Sec. 185(a) 2

28 U.S.C. Sec. 1254(1) 1

Other Authorities

Aaron, "An Overview", *The Changing Law of Fair Representation* (ILR Press 1985) 19

Clark, "The Duty of Fair Representation: A Theoretical Structure", 51 Tex. L. Rev. 1119 (1973) 27

Gregory, "A Call for Supreme Court Clarification of the Union Duty of Fair Representation", 29 St. Louis U.L.J. 45 (1984) 26

OPINIONS BELOW

The decisions of the Ninth Circuit Court of Appeals and the District Court for the Central District of California in this case have not been reported.

JURISDICTION

Petitioners seek review of the Ninth Circuit Court of Appeals' Judgment affirming the California Central District Court's entry of summary judgment in favor of Respondent Local 274.

The Ninth Circuit's Judgment was entered on November 25, 1988. *See* App. 2 (copy of Judgment).

The Ninth Circuit entered an order denying Petitioners' request for rehearing on December 21, 1988. *See* App. 1 (copy of order).

Jurisdiction of this petition is grounded on 28 U.S.C. Sec. 1254(1).

Federal jurisdiction of Petitioners' action against Respondent Local 274 was founded on the right of action judicially implied from Section 9(a) of the National Labor Relations Act, 29 U.S.C. Sec. 159(a), the text of which is reproduced at page 2, *infra*. *See Vaca v. Sipes*, 386 U.S. 171 (1967). In addition, Petitioners' action originally contained a claim against their employer for breach of the collective bargaining agreement pursuant to Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. Sec. 185(a).

STATUTE INVOLVED

Section 9(a), National Labor Relations Act, 29 U.S.C. Sec. 159(a):

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

STATEMENT OF THE CASE

1. Introduction.

Petitioners are 33 older production workers who were discharged without notice on November 16, 1984, when their employer of many years suddenly subcontracted out its production work to an affiliated nonunion company in apparent violation of the collective bargaining agreement.

Petitioners contend their Union breached the duty of fair representation by (1) missing the deadline for filing a grievance protesting their mass discharge and (2) conducting only a belated and perfunctory investigation into the merits of their grievance.

Summary judgment should have been denied below because, although it is true that Respondent Union did not

intentionally err, the Union did commit gross negligence.[1]

2. The Mass Terminations.

Petitioners are 33 of the approximately 100 employees of Leo's Quality Foods ("Leo's") who were unexpectedly fired on November 16, 1984.

At the time of their sudden mass discharge, nearly all of the Petitioners were over 40 years old, and all had been continuously employed by Leo's for many years. All had also been dues-paying members of Respondent Local 274 for years.

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1 The District Court below acknowledged that the Union failed to decide, within the time limit set by the collective bargaining agreement, whether to file a grievance:

> [PETITIONERS' COUNSEL:] There's no evidence that a decision ever was made within the time limits of the grievance.
>
> THE COURT: That's correct.

App. 26 (transcript of hearing on motion for summary judgment).

For example, at the time of the mass discharge, Petitioner Orkis was 53 years old, had been continuously employed by Leo's for 28 years, and had been a member of Respondent Union for 27 years.[2] Petitioner Salazar was 48 years old; she had been employed by Leo's and been a member of the Union for 21 years.[3] Petitioner Lemus was 48 and had worked and been a Union member for 17 years.[4] And so on.

The sudden mass termination was explained at the time by a handout -- distributed to the stunned employees with their final paychecks as they were escorted from the Leo's premises by armed

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2 *See* App. 79 (excerpt from Declaration of Petitioner Orkis). All supporting references herein are to papers which are in the record below.

3 *See* App. 78 (excerpt from Salazar Deposition).

4 *See* App. 77 (excerpt from Lemus Declaration).

guards[5] -- which claimed that Leo's owner had "sold Leo's to a new company who will form its own business".[6]

In fact, Leo's was not sold. Although some corporate stock changed hands, Leo's continued to exist as an operating corporation, and Leo's retained the benefits of a tax loss carryforward.[7] The true nature of the "sale" was that Leo's simply cut its labor costs by subcontracting its production work to a

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5 *See* App. 80-82 (excerpt from Orkis Declaration).

6 *See* App. 54 (text of termination notice).

7 *See* App. 61 (excerpt from Declaration of Union attorney Rothner). The Sixth Circuit has held this kind of tax benefit to be sufficient to establish an alter ego relationship on similar facts. *See Miami Foundry Corp. v. NLRB*, 682 F.2d 587, 589 (6th Cir. 1982). The D.C. Circuit considers the tax loss carryforward to be a factor in an alter ego analysis, but not dispositive. *See United Food & Commercial Workers Int'l Union v. NLRB*, 768 F.2d 1463, 1471 (D.C. Cir. 1985).

newly formed, nonunion,[8] but ostensibly independent company ("TWC") that would lease Leo's production facilities -- for a period of only 6 months. After the 6-month period, Leo's was free to take back its production work.[9]

3. The Potential Grievances.

Leo's 6-month subcontracting maneuver appeared to violate several provisions of the collective bargaining agreement between Leo's and Respondent Local 274. Among these were:

(1) Article XXIX, Section 2, which Petitioners contend allowed Leo's to subcontract only if it required the

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8 *See* App. 66-67 (excerpt from Holeman Deposition).

9 *See* App. 50-53 (excerpts from the Leo's/TWC lease and subcontract agreements). Six months, of course, is the limitations period for unfair labor practices under Section 10(b) of the National Labor Relations Act, 29 U.S.C. Sec. 160(b). Coincidence? We think not.

subcontractor to assume the collective bargaining agreement and continue Petitioners' employment as a condition of getting the subcontracted business;[10]

(2) Article I, Sections 1 and 3, which Petitioners contend prohibited Leo's from having its production work done by any persons who were not covered by the collective bargaining agreement;[11]

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10 See App. 49 (excerpt from the collective bargaining agreement). These kinds of clauses impose no duty on the buyer absent a successorship relationship, but they can require the seller to condition the sale on the buyer's assumption of the contract (or at least require arbitration of the issue). *E.g., Local No. 381, IUOE v. Tosco Corp.*, 823 F.2d 265 (8th Cir. 1987) (compelling arbitration); *Nursing Home & Hospital Union No. 434 v. Sky Vue Terrace, Inc.*, 759 F.2d 1094 (3d Cir. 1985) (enjoining transfer pending arbitration); *Local Lodge No. 1266, IAM v. Panoramic Corp.*, 668 F.2d 276 (7th Cir. 1981) (same); *Bressette v. Int'l Talc Co., Inc.*, 527 F.2d 211 (2d Cir. 1975) (compelling arbitration).

11 See App. 45-46 (excerpt from the collective bargaining agreement). *Cf. Warehousemen's Union Local No. 206 v. Continental Can Co.*, 821 F.2d 1348 (9th

(3) Article XXIII, Section 2, which prohibited Leo's from firing anybody without "just and sufficient cause".[12]

4. Time Limit for Grievances.

Article XXIII of the collective bargaining agreement contained strict time limits for filing grievances. The contract allowed a maximum of 10 calendar days after the employer's wrongful action in which to file. Failure to file in timely fashion resulted in a waiver of the grievance which even an arbitrator would be powerless to excuse.[13]

Cir. 1987) (compelling arbitration of dispute over employer's ability to subcontract work covered by collective bargaining agreement).

12 See App. 46 (excerpt from the collective bargaining agreement).

13 See App. 46-48 (excerpt from the collective bargaining agreement).

5. The Union Assumes Responsibility for Filing Timely Grievances.

At Local 274's membership meeting on November 19, the Union's president, Don Holeman, told the discharged employees not to file individual grievances, explaining that Local 274 would take all appropriate action to preserve their contract rights.[14]

This move represented a radical departure from the Union's established policy. According to Ed Dominguez, the Union official who later succeeded Holeman as president of Local 274, the Union's policy had been always to

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14 *See* App. 83-85 (excerpt from Petitioners' verified interrogatory responses). Apparently the Union's assumption of all responsibility for filing any grievances on behalf of the discharged employees was designed to eliminate the administrative inconvenience of dozens of individual grievances. *See* App. 75-76 (excerpt from Respondent Union's summary judgment reply brief).

encourage employees to get their grievances on file in timely fashion, regardless of the Union's initial impression of the degree of merit.[15]

This policy was obviously prudent in light of the collective bargaining agreement's short (and unyielding) time limit for filing grievances.

When Holeman departed from that policy and told Petitioners not to file individual grievances, he left Petitioners entirely dependent on the Union's diligence in meeting the contractual deadline.

6. Union President Instructs Union Attorney to Investigate and Report Back ... Then Goes on Vacation while the Grievance Deadline Expires.

On the same day as the membership meeting, November 19, Holeman instructed

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15 See App. 73-74 (excerpt from Dominguez Deposition).

Local 274's attorney, Glenn Rothner, to investigate the options and report back to him so that he could decide what to do. Rothner testified that, at the time of the November 19 meeting, he did not know whether there was any merit to a grievance.[16]

But while the clock ticked away on the grievance time limit, Holeman went on vacation! After the November 19 meeting, although Rothner did investigate to some degree,[17] and may even have tried to

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16 See App. 64 (excerpt from the Rothner Deposition). The November 19 discussion did not result in a decision about whether to file a grievance; Holeman and Rothner considered that discussion to be merely a preliminary step in setting up the necessary investigation, and both expected it would be followed up by a subsequent decision-making conference. *See* App. 69-70 (excerpt from Holeman Deposition); App. 60 (excerpt from Rothner Declaration); App. 64 (excerpt from Rothner Deposition).

17 Rothner gave two different versions of what he did, one of which effectively reduces that "investigation" to a single 15-minute telephone conversation with

reach Holeman,[18] Holeman did not speak again with Rothner until December 17, 1984 -- 3 weeks after the grievance deadline had expired.[19]

No grievance was ever filed.

7. Proceedings in the District Court.

On May 15, 1985, Petitioners filed their complaint in the United States District Court for the Central District of California.[20] The principal claims of the action were (1) against Leo's for breach of the collective bargaining agreement and (2) against Local 274 for

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Leo's attorney. *See* App. 60-62 (excerpt from Rothner Declaration).

18 *See* App. 72 (excerpt from Holeman Deposition).

19 *See* App. 72 (excerpt from Holeman Deposition); App. 62 (excerpt from Rothner Declaration).

20 Petitioners also filed unfair labor practice charges with the NLRB, but withdrew the charges after learning that the NLRB did not plan to issue complaints.

breach of the duty of fair representation.

After the defendant's first summary judgment motions were denied by the Honorable J. Spencer Letts on September 3, 1986, Petitioners settled with Leo's. After the settlement, Local 274 was the sole remaining defendant.

Local 274 renewed its motion for summary judgment, and on June 1, 1987, Judge Letts orally granted the motion.[21] Judgment was entered on June 24, 1987.[22] On September 9, 1987, Judge Letts issued Supplemental Findings of Fact and Conclusions of Law.[23]

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21 See App. 21-44 (transcript of hearing).

22 See App. 19-20 (copy of judgment).

23 See App. 15-18 (copy of Supplemental Findings and Conclusions).

8. Proceedings in the Ninth Circuit.

Petitioners timely appealed the summary judgment, arguing that Local 274 had breached its duty of fair representation both by missing the deadline for filing grievances and by conducting a perfunctory investigation.

The Ninth Circuit affirmed the judgment in a memorandum decision filed November 25, 1988.[24]

The memorandum decision rejected Petitioners' contention that Local 274 had missed the contractual time limit, finding that Local 274's Holeman and Rothner had considered the merits of potential grievances and affirmatively decided not to file.[25]

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24 See App. 4-14 (copy of Memorandum).

25 But see App. 26 (transcript of hearing on summary judgment motion indicates District Court agreed with Petitioners that Union did not make decision about grievance before contractual time limit had expired).

The Ninth Circuit also rejected the charge of perfunctory investigation, finding that the Union's decision not to file was based on Rothner's investigation, which it found to be adequate under the circumstances.[26]

Petitioners timely sought rehearing, explaining that, when the sequence of events is scrutinized, it becomes quite clear that the Union either made no decision about filing a grievance within the contractual time limit or made that decision before conducting its grievance investigation.

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26 Given the procedural posture of the case, this finding is inexplicable, inasmuch as Rothner offered two different versions of his investigation. In the first version, Rothner's "investigation" effectively consisted of one 15-minute telephone call with Leo's attorney. *See* App. 60-62 (excerpt from Rothner Declaration). It is true that Rothner's deposition testimony claimed a more extensive investigation, but the substantial difference between the two versions alone should have prevented summary judgment.

The Ninth Circuit's memorandum decision recited that Holeman and Rothner together made the decision about whether to file a grievance.[27] In addition, however, Holeman had testified that, after the November 19 meeting with Rothner, he did not again communicate with Rothner (or do anything else on Petitioners' behalf) until after December 17.[28]

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27 In the Court's words:

> They [Holeman and Rothner] decided within the time specified in the CBA not to file any grievance.

App. 11 (Memorandum) (emphasis added).

28 Holeman testified:

> Q. After that [November 19] conversation with Glenn Rothner, what was the next action you took with respect to Leo's?
>
> A. I talked to Glenn Rothner again.
>
> Q. When did that occur?
>
> A. Oh, it would be some time after December 12th, shortly after -- December 12th actually would be after. The 12th, 13th, 14th, 15th, 16th.

Therefore, the Union's decision not to file must have occurred either before November 19 or after December 17. If the former, the decision necessarily occurred before Holeman had learned the results of Rothner's investigation; if the latter, the decision necessarily occurred after the grievance time limit had passed.

The Ninth Circuit denied rehearing in an order filed December 21, 1988.[29] That order, which contained no opinion, left the logical inconsistency unresolved.

Around the 17th of November or shortly thereafter.

Q. Is that the 17th of December?

A. I mean December.

App. 72 (excerpt from Holeman Deposition).

29 *See* App. 1 (copy of order denying rehearing).

REASONS FOR GRANTING THE WRIT

1. The Circuits Are Badly Split.

The Supreme Court defined the permissible limits of union error 22 years ago when, in *Vaca v. Sipes*, 386 U.S. 171 (1967), it established the now-famous "arbitrary, discriminatory, or in bad faith" standard. *See id.* at 190.

The lower courts have since fallen into extreme disarray over the application of this standard to specific cases. Some say the Supreme Court's post-*Vaca* decisions have contributed to, not alleviated, the confusion:

> There are conflicts between state and federal courts, between the federal circuit courts of appeals, and sometimes between decisions of the same circuit; and the Supreme Court's pronouncements in this area can most charitably be likened to a trumpet that gives an uncertain sound.

B. Aaron, "An Overview", *The Changing Law of Fair Representation* (ILR Press 1985).

The Courts of Appeal are badly split over the question whether gross negligence is sufficiently conduct to as to breach the duty of fair representation.[30]

The Circuits have taken three distinct positions: the Seventh Circuit says no; the First, Fourth, Sixth, Eighth, and Eleventh say yes; and the Ninth Circuit says sometimes.

a. Seventh Circuit.

The Seventh Circuit flatly holds that gross negligence is never enough; as far as the duty of fair representation is concerned, a union in Illinois, Indiana or Wisconsin can do everything short of intentional misconduct with absolute

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30 In the words of the Eleventh Circuit, "[t]he only thing that the federal courts seem to be in agreement on with respect to the duty of fair representation is that mere negligence is not a breach of this duty." *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1521 (11th Cir. 1988).

impunity. *E.g., Adams v. Budd Co.*, 846 F.2d 428, 432-33 (7th Cir. 1988), *cert. denied*, 109 S.Ct. 791 (1989).

b. Plurality View.

The plurality view, including at least[31] the First, Fourth, Sixth, Eighth and Eleventh Circuits, is squarely to the contrary.

In the First Circuit, a union's grossly negligent failure to press an apparently meritorious grievance violates the duty of fair representation despite the court's having "rule[d] out any possibility of subjective bad faith,

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31 Some Courts of Appeals have issued rulings that seem incompatible with any view other than that of the plurality, but without explicitly discussing sa gross negligence standard. *E.g., Griesmann v. Chemical Leaman Tank Lines*, 776 F.2d 66, 74-75 (3d Cir. 1985) (vacating jury verdict in union's favor despite apparent absence of evidence of intentional misconduct on ground that jury instructions did not alert jury that union's failure to press plaintiff's contractual rights in arbitration might be basis for imposing liability).

hostility, discrimination or dishonesty on the part of the union officials". *DeArroyo v. Sindicato de Trabajadores Packinghouse*, 425 F.2d 281, 284 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970). *See also Williams v. Sealand Corp.*, 844 F.2d 17, 21 (1st Cir. 1988) (citing *DeArroyo* with approval).

The Fourth Circuit holds that, "[w]hen it addresses the merits of an individual grievance [as opposed to contract negotiations], the union is not entitled to a '"wide range of reasonableness"' in its conduct." *Dement v. Richmond, Fredericksburg & Potomac Railroad Co.*, 845 F.2d 451, 460 (4th Cir. 1988) (emphasis added). The Fourth Circuit answers the Seventh this way:

> [I]t is not necessary that the union's breach be intentional. A union representative could be so indifferent to the rights of members or so grossly deficient in his conduct purporting to protect the rights of members

> that the conduct could be equated with arbitrary action.

Wyatt v. Interstate & Ocean Transport Co., 623 F.2d 888, 891 (4th Cir. 1980); *accord, e.g., Smith v. Local 7898, United Steelworkers of America*, 834 F.2d 93, 96 (4th Cir. 1987).

The Sixth Circuit agrees that "good faith errors do not insulate unions from liability". *Ruzicka v. General Motors Corp.*, 707 F.2d 259, 260 (6th Cir.), *cert. denied*, 464 U.S. 982 (1983).

So does the Eighth Circuit:

> Fraud or bad faith is not necessary to charge unfair representation if the union's conduct is otherwise arbitrary or perfunctory, ... nor must a jury necessarily find substantial evidence of fraud, deceitful action or dishonest conduct to conclude that a union breached its duty of fair representation.

Smith v. Hussman Refrigerator Co., 619 F.2d 1229, 1245 (8th Cir. 1980). *Accord, e.g., Thomas v. Bakery, Confectionery and*

Tobacco Workers Union Local 433, 826 F.2d 755, 763 (8th Cir. 1987), *cert. denied*, 108 S.Ct. 1019 (1988) (allowing claim to reach jury, despite absence of intentional misconduct, where union's failure to introduce critical piece of evidence in arbitration constituted a "serious flaw").

Similarly, in the Eleventh Circuit, "a demonstration that the union acted with reckless disregard for the employee's rights or was grossly deficient in its conduct will suffice". *Harris v. Schwerman Trucking Co.*, 668 F.2d 1204, 1206-07 (11th Cir. 1982). *See also Parker v. Connors Steel Co.*, 855 F.2d 1510, 1519-20 (11th Cir. 1988) (citing *Harris* with approval).

c. Ninth Circuit.

The Ninth Circuit straddles the fence, applying the plurality's rule to ministerial acts, but the Seventh

Circuit's rule to matters involving the exercise of judgment:

> [W]e ask first whether the act in question involved the union's judgment, or whether it was "procedural or ministerial." ... If it is a union's judgment that is in question ... the plaintiff may prevail only if the union's conduct was discriminatory or in bad faith. Arbitrariness alone would not be enough. Only when the challenged conduct was procedural or ministerial does arbitrariness become controlling.

Moore v. Bechtel Power Corp., 840 F.2d 634, 636 (9th Cir. 1988).

d. Need for Supreme Court Guidance.

The 3-way split in the Circuit Courts strongly suggests a clarifying decision is badly needed. *Cf. Bowen v. United States Postal Service*, 459 U.S. 212, 593 (1983) (clarifying the damages standard for unfair representation after observing (euphemistically) that "[a]lthough *Vaca*'s governing principle [regarding damages] is well established,

its application has caused some uncertainty").

The need for guidance is also apparent from the wealth of literature exploring the problem of the lower courts' conflicting approaches. *See, e.g.*, D.L. Gregory, "A Call for Supreme Court Clarification of the Union Duty of Fair Representation", 29 St. Louis U.L.J. 45 (1984).

Petitioners respectfully submit that now is the time to dispel the confusion.

2. Millions of Employees Currently Have No Remedy for Unions' Gross Negligence.

By virtue of the Seventh and Ninth Circuits' hostile standards, the millions of men and women who work in union shops in Illinois, Indiana and Wisconsin, and also (as to nonministerial matters) in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, have no judicial remedy

against outrageous union misconduct that falls short of being intentional.

For unions in those states, this represents a powerful disincentive to careful grievance-handling. In a world of limited economic resources, the quality of unions' contract administration is bound to suffer when there is no cost to sloppiness. Moreover:

> A bad faith standard of fair representation cannot enforce the union's affirmative responsibilities. It can prohibit invidious distinctions like race and possibly sex, and it can inhibit deliberate attempts to sacrifice the rights of individual employees, but it cannot ensure that a union will offer minimal representation to all the employees it serves. In brief, a bad faith standard allows unions to make unfounded decisions as long as there is no evidence of deliberate wrongdoing.

Clark, "The Duty of Fair Representation: A Theoretical Structure", 51 Tex. L. Rev. 1119, 1132 (1973).

For employees in the Seventh and Ninth Circuits -- such as Petitioners -- this represents a fundamental injustice.

3. The Case at Bar Is a Good Vehicle for a Clarifying Supreme Court Decision.

They say that hard cases make bad law. The case at bar is a relatively easy one regardless of the standard ultimately adopted by the Supreme Court; a clarifying decision based on Petitioners' case is likely to be as lucid as fair representation decisions can get.

Consider: If this Court adopts the Ninth Circuit's view, Petitioners' case presents a perfect opportunity to define the outer limits of the ministerial/judgmental distinction, because Petitioners complain both of a ministerial error (the missed deadline) and of a judgmental error (the perfunctory investigation).

If this Court instead adopts the Seventh Circuit's view, Petitioners will lose their case, but in that event -- because the basic equities so strongly favor Petitioners -- there will be no doubt that the Court intended to foreclose liability for everything but intentional misconduct.

And finally, if gross negligence is the correct standard, Petitioners' case is ideal in two respects.

First, the procedural posture of the case -- review from a summary judgment -- both creates decisional flexibility and makes it possible to clarify the fair representation standard without making excessively rigid pronouncements. For example, this Court has the option of saying either that Respondent Union's behavior constitutes unfair representation as a matter of law or merely that Petitioners' case presents a

triable issue regarding whether the Union was grossly negligent.

Second, on the merits of the gross negligence issue Petitioners have a strong case, not a marginal one.

Contrary to the Ninth Circuit's findings that Respondent Union both made a timely decision not to file a grievance and conducted an adequate investigation, when the sequence of events is scrutinized it becomes quite clear that the Union either made no decision about filing a grievance within the contractual time limits or made that decision before conducting its grievance investigation.

This is easily seen:

1. On November 16, 1984, Petitioners were discharged in apparent violation of the collective bargaining agreement. The 10-day clock started running on the time to file grievances.

2. On November 19, 1984, Union president Holeman took the extraordinary step (contrary to established Union policy) of telling Petitioners not to file individual grievances. He assured them the Union would protect their contract rights. He also told Union attorney Rothner to investigate the options and report back so that he could make a decision about filing a grievance. There were 7 days left in which to file.

3. On November 26, 1984, the contractual limitations period for filing grievances expired. No grievance had been filed. What was the Union president doing? He was on vacation! He had not been in touch with Union attorney Rothner since November 19.

4. On December 17, 1989 -- 3 weeks after the grievance deadline passed -- Rothner spoke with Holeman for the first time since November 19. This was the

first moment that Rothner reported on his investigation.

Thus, although it is possible that Holeman secretly decided, before the grievance deadline had expired, that he would not file a grievance on Petitioners' behalf, if he did make that timely decision he must have made it without the benefit of Rothner's investigation.

Similarly, although it is possible that Holeman decided not to file a grievance on the basis of Rothner's investigation, if he did wait for the results of the investigation he must have made the decision whether to file after the contractual deadline had already expired.

It is simply not possible that Holeman <u>both</u> decided not to file a grievance before the deadline had passed

and based his decision on Rothner's investigation.

Therefore the Union either committed the ministerial error of inadvertently missing the grievance deadline, or it committed the judgmental error of consciously letting the deadline pass without having investigated the merits of Petitioners' grievance.

In either event, the Union committed gross negligence.

Because Petitioners' case falls close to the heart of any reasonable standard based on gross negligence, it would be a good vehicle for a decision of the Supreme Court clarifying the fair representation standard.

CONCLUSION

Who should pay the price of unions' gross negligence? Those who suffer? Or those who cause the suffering? We humbly

suggest that to ask the question is to answer it.

Dated: March 21, 1989

Respectfully submitted,

MICHAEL B. MARGOLIS, ESQ.
Counsel for Petitioners

NO: 88-1578

Supreme Court, U.S.
F.I.L.E.D
MAR 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1988

RODRIGO ALONSO, ET AL.,
PETITIONERS

v.

LEO'S QUALITY FOODS, ET AL.,
RESPONDENTS

Appendix to

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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TABLE OF CONTENTS*

Orders of Court of Appeals

ORDER DENYING REHEARING IN COURT OF APPEALS 1

JUDGMENT IN COURT OF APPEALS 2

MEMORANDUM DECISION OF COURT OF APPEALS 4

Orders of District Court

SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW 15

JUDGMENT IN DISTRICT COURT 19

REPORTER'S TRANSCRIPT OF HEARING ON RENEWED SUMMARY JUDGMENT MOTION 21

Selected Record Evidence

COLLECTIVE BARGAINING AGREEMENT [EXCERPTS] 45

LEO'S/TWC LEASE/SUBCONTRACTING AGREEMENT [EXCERPTS] 50

TERMINATION NOTICE (11/16/84) 54

DECLARATION OF GLENN ROTHNER 56

DEPOSITION OF GLENN ROTHNER [EXCERPTS] 64

---

* The document titles used below, which are also reproduced in the Appendix before the text of the documents themselves, are for ease of reference only.

DEPOSITION OF DONALD HOLEMAN [EXCERPTS] 65

DEPOSITION OF A. ED DOMINGUEZ [EXCERPT] 73

LOCAL 274'S SUMMARY JUDGMENT REPLY BRIEF [EXCERPT] 75

DECLARATION OF ANTONIO LEMUS (EXCERPT) 77

DECLARATION OF CARMEN SALAZAR (EXCERPTS) 78

DECLARATION OF BEATRICE ORKIS [EXCERPTS] 79

PLAINTIFFS' INTERROGATORY RESPONSES (EXCERPT) 83

[ORDER DENYING REHEARING IN COURT OF APPEALS]

(filed 12/21/88)

NOT FOR PUBLICATION
United States Court of Appeals
for the Ninth Circuit

No. 87-6501
DC #CV-85-3258-JSL
ORDER

RODRIGO ALONSO; MARIA ALONSO; FRANCISCO BARBA; JOSE BECERRA; HECTOR BENAVIDES; ANTONIA BURCIAGA, et al.,

Plaintiffs-Appellants,

vs.

LEO'S QUALITY FOODS; WHITTINGTON COMPANY; FOOD AND COMMERCIAL WORKERS LOCAL 274; JULIUS BELL; ROBERT BELL; ARLENE BELL, et al.,

Defendants-Appellees.

Before: WRIGHT, NORRIS, and WIGGINS, Circuit Judges.

The Petition for Rehearing has been considered and is denied.

[JUDGMENT IN COURT OF APPEALS]

JUDGMENT

United States Court of Appeals
for the Ninth Circuit

No. 87-6501
DC #CV-85-3258-JSL

RODRIGO ALONSO; MARIA ALONSO; FRANCISCO BARBA; JOSE BECERRA; HECTOR BENAVIDES; ANTONIA BURCIAGA, et al.,

Plaintiffs-Appellants,

vs.

LEO'S QUALITY FOODS; WHITTINGTON COMPANY; FOOD AND COMMERCIAL WORKERS LOCAL 274; JULIUS BELL; ROBERT BELL; ARLENE BELL, et al.,

Defendants-Appellees.

APPEAL from the United States District Court for the Central District of California

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is AFFIRMED

Filed and entered November 25, 1988

[MEMORANDUM DECISION OF COURT OF APPEALS]
(filed 11/25/88)

NOT FOR PUBLICATION
United States Court of Appeals
for the Ninth Circuit

No. 87-6501
DC #CV-85-3258-JSL
MEMORANDUM*

RODRIGO ALONSO; MARIA ALONSO; FRANCISCO BARBA; JOSE BECERRA; HECTOR BENAVIDES; ANTONIA BURCIAGA, et al.,

Plaintiffs-Appellants,

vs.

LEO'S QUALITY FOODS; WHITTINGTON COMPANY; FOOD AND COMMERCIAL WORKERS LOCAL 274; JULIUS BELL; ROBERT BELL; ARLENE BELL, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Central District of California
District Judge J. Spencer Letts, Presiding

[Argued and Submitted October 31, 1988 - Pasadena, CA]

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Before: WRIGHT, NORRIS, and WIGGINS, Circuit Judges.

We consider whether the union breached its duty of fair representation by failing to file a grievance within the time limit specified in the Collective Bargaining Agreement and whether it conducted an adequate investigation.

BACKGROUND

The United Food and Commercial Workers Union, Local 274 AFL-CIO, represented the employees of Leo's Quality Foods, Inc. In November 1984, Fredric Richman, Leo's attorney, informed Donald Holeman, president of Local 274, that Leo's was being sold to Stephen Whittington, would close down business and discharge its employees effective that day and that the new company would not likely hire any of Leo's employees.

Holeman scheduled a union membership meeting for Monday, November 19, and made

an appointment with the attorney, Glen Rothner, to discuss the closure and sale of Leo's. At the union meeting Holeman relayed the information given to him by Richman. He told the members that the union was investigating a claim that Whittington's operation was Leo's alter ego and that it would notify them if a grievance was filed. Holeman told the employees that the sale did not appear to be a sham to avoid th union contract, explained their rights under the CBA and encouraged them to apply for jobs with the new company. Holeman and Rothner then met to discuss what action the union might take.

The union filed no grievance. Appellants claimed that it breached its duty of fair representation by failing to file a timely grievance and failing to conduct an adequate investigation. The district court granted summary judgment

in favor of the union. We review de novo. Moore v. Bechtel Power Corp., 840 F.2d 634, 636 (9th Cir. 1988).

Duty of Fair Representation Analysis

In exchange for a union's exclusive bargaining rights, the Supreme Court imposes a duty of fair representation. Id. at 636. The union breaches its duty when its acts are arbitrary, discriminatory or in bad faith. Vaca v. Sipes, 386 U.S. 171, 190 (1967).

A. Failure to File a Grievance

To determine whether the union breached its duty, we ask whether the act in question involved the union's judgment or whether it was procedural or ministerial. Moore, 804 F.2d at 636. If the union exercised its judgment, then it breaches its duty of fair representation only of the conduct was discriminatory or in bad faith. If the act in question was procedural or ministerial, the union

breaches its duty only if the conduct was arbitrary. Id.

Appellants characterize the union's failure to file a grievance as a ministerial omission subject to the arbitrary standard.1/ They rely on Dutrisac v. Caterpillar Tractor Co., 749 F.2d 1270 (9th Cir. 1983), where we classified the union's failure to file timely a meritorious grievance as

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1 We have found arbitrary conduct when the union failed: to disclose its decision not to submit an employee's grievance to arbitration when she was deciding whether to accept a settlement offer from her employer, Robesky v. Quantas Empire Airways, Ltd., 573 F.2d 1082, 1091 (9th Cir. 1978); to consider individually the grievances of employees where the factual and legal differences among them were significant, Gregg v. Chauffers, Teamsters & Helpers Union Local 150, 699 F.2d 1015, 1016 (9th Cir. 1983); to permit employees to explain the events which led to their discharge before deciding not to submit their grievances to arbitration, Thenorio v. NLRB, 680 F.2d 598, 601 (9th Cir. 1982) and; to notify the employer of an employee's steward status, Galindo v. Stoody, Co., 793 F.2d 1502, 1515 (9th Cir. 1986).

arbitrary conduct and found a breach of the unon's duty. Id. at 1273-74. Their reliance is misplaced.

The arbitrary standard is inapplicable where the union evaluates a claim, finds it meritless and thereafter fails to perform a ministerial act. Eichelberger v. NLRB, 765 F.2d 851, 855 n.7 (9th Cir. 1985).

> In all cases in which we found a breach of the duty of fair representation based on a union's arbitrary conduct, it is clear that the union failed to perform a procedural or ministerial act, that the act in question did not require the exercise of judgment and that there was no rational and proper basis for the union's conduct... We have never held that a union has acted in an arbitrary manner where the challenged conduct involved the union's judgment as to how best to handle a grievance....

Peterson v. Kennedy, 771 F.2d 1244, 1254 (9th Cir. 1985), cert. denied, 475 U.S. 1122 (1986).

A union exercises its judgment when it evaluates a grievance and decides not to pursue it. We may not deem a union's failure to file arbitrary simply because it evaluated incorrectly the merits of a grievance. Id. at 1254.

The union here considered a number of grievances, including the possibility of an alter ego claim, within the time period specified in the CBA and decided not to pursue any charge.2/ When attorney Rothner and Holeman met on the first business day after the sale, they believed there was insufficient information to establish an alter ego charge. They discussed filing grievances under Article XXIX of the CBA, examined the possibility of bringing an unfair labor practice charge with the National

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2 Under section 2 of the CBA, an employee has three days to file a written grievance and under section 3 he or she has ten days.

Labor Relations Board and considered asserting successorship rights. Rothner warned against aggressive union action fearing that the new employer might hire fewer employees. They decided within the time specified in the CBA not to file any grievance.

When a union, as here, exercised its judgment by deciding not to pursue a meritless grievance and not to aggravate a new employer, appellants prevail only if the union acted in bad faith or with discrimination. See Peterson, 771 F.2d at 1254. Disagreement between a union and a member standing alone is not evidence of bad faith even when the grievance has merit. Moore, 804 F.2d at 637. Appellants presented no evidence of bad faith or discrimination. Without such evidence, we accept the union's judgment and find no breach.

B. Failure to Investigate Adequately

Appellants contend that the union breached its duty by conducting a perfunctory investigation. A union acts arbitrarily when it ignores a meritorious grievance or handles it in a perfunctory manner. Vaca, 386 U.S. at 191. It must perform at least a minimal investigation, the thoroughness of which varies with the circumstances. Evangelista v. Inlandboatmen's Union of Pac., 777 F.2d 1390, 1395 (9th Cir. 1985). Although special care must be exercised when handling a discharge grievance, extensive investigation is unnecessary where additional evidence would not have altered the union's decision. Id. at 1395-96. Refusing to process a meritless grievance, cannot alone be deemed arbitrary. Eichelberger, 765 F.2d at 857 n.10

The union did not ignore a meritorious grievance or handle it in a perfunctory manner. See, e.g., id. (president's reading of letter several times considered sufficient investigation). After Holeman and attorney Rothner met, Rothner researched the possibility of filing an alter ego grievance and of asserting rights under the CBA. He reviewed the CBA, talked with his colleagues, and discussed the transaction with Leo's attorney Richman.

Appellants complain that the union failed to obtain transactional documents, did not return phone calls and did not investigate the identity of supervisory and management personnel.3/ Rothner discussed the transactional documents with Richman and later found them to be as described. Examining the

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3 Appellants also complain that the union did not keep notes. This is meritless.

documents would not have influenced materially the union's judgment. See Peterson, 771 F.2d at 1255. Although appellants called the union they did not allege they had information which would have altered its decision. The union need not obtain explanations from every grievant to satisfy its duty. Evangelista, 777 F.2d at 1395. The union did ask appellant Lemus to investigate the identity and number of employees hired by Whittington. Further investigation would not have aided the union.

Because we find no breach, we do not decide whether in a duty of fair representation claim a court may award emotional distress damages or whether there is a right to jury trial.

AFFIRMED.

[SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW]
(filed 9/25/87)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 85-3258 JSL (Px)
SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

RODRIGO ALONSO, et al.,

Plaintiffs,

vs.

LEO'S QUALITY FOODS, et al.,

Defendants.

The court believes that the factual bases of its ruling of June 1, 1987 and the legal reasoning which led thereto are adequately set forth in the transcript of the proceeding. For that reason, the Court did not address these matters by separate memorandum.

Because there seems to be a lack of agreement as to the adequacy of the transcript for its intended purpose,

these Supplemental Findings of Fact and Conclusions of Law are stated and published pursuant to Federal Rules of Civil Procedure 60(a).

1. It would not have been practical, in light of the complexity of the issues involved, for the plaintiffs to pursue individual grievances.

2. Advice given by Union officials to the plaintiffs to leave the matter in the hands of the Union was therefore sound and did not, in and of itself, breach the Union's duty of fair representation.

3. There is no substantial evidence that the Whittington/Leo's transaction was intended as a sham or that it was entered into for the purpose of avoiding the obligations of the collective bargaining agreement.

4. The description given by counsel for Leo's to the Union counsel was given

in good faith and fairly described in the transaction as he understood it. Counsel was justified in relying on this description.

5. The reliance by counsel upon the description given to him of the transaction and the legal examination done by him to ascertain whether the transaction violated the rights of any Union members were reasonable in the circumstances.

6. The conclusion reached by the Union lawyer that successful claims could not be made against Leo's or Whittington under the collective bargaining agreement or otherwise under applicable law was reasonable.

7. The failure of the Union to pursue any such claim did not violate the duty of fair representation owed by the Union to the plaintiffs.

8. The Court's own view that such a claim, if made, would have been successful depended upon factual and legal analyses which would have been difficult for the Union lawyer to duplicate, without information he did not have and expertise not readily available to him.

9. Based upon the foregoing, the Union did not breach its duty of fair representation to the plaintiffs or otherwise violate any legal duty owed to them.

Dated: September 22, 1987

/s/
J. Spencer Letts
United States District Judge

[JUDGMENT IN DISTRICT COURT]
(filed 6/24/87)

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 85-3258 JSL (Px)
JUDGMENT

RODRIGO ALONSO, et al.,

Plaintiffs,

vs.

LEO'S QUALITY FOODS, et al.,

Defendants.

The court having fully considered the arguments of counsel for both

parties, both written and oral, and having determined that there is no material factual dispute, and that the Union did not breach its duty of fair representation, as a matter of law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiffs' remaining causes of action be dismissed, with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Clerk of this Court shall enter an Order dismissing Plaintiffs' complaint.

DATED: June 22, 1987.

/s/
THE HONORABLE J. SPENCER LETTS
UNITED STATES DISTRICT JUDGE

[REPORTER'S TRANSCRIPT OF HEARING ON RENEWED SUMMARY JUDGMENT MOTION]
(6/1/87)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE HONORABLE J. SPENCER LETTS, PRESIDING
UNITED STATES DISTRICT COURT JUDGE

CASE NO. CV 85-3258 JSL

RODRIGO ALONSO, et al.,

Plaintiffs,

vs.

LEO'S QUALITY FOODS, et al.,

Defendants.

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS

MONDAY, June 1, 1987
LOS ANGELES, CALIFORNIA

UNION'S RENEWED MOTION FOR SUMMARY JUDGMENT

TERRY KRAMER, CVR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
312 NORTH SPRING STREET
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TERRI A. TUCKER
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LOS ANGELES, CALIFORNIA, MONDAY, 6/1/87

2:00 O'CLOCK P.M.

THE CLERK: CV-85-3258-JSL, Rodrigo Alonso, et al., versus Leo's Quality Foods, et al.

MR. MARGOLIS: Good afternoon, Your Honor. Mike Margolis for the Plaintiffs; that's M-a-r-g-o-l-i-s.

MR. DOHRMAN: Good afternoon, Your Honor. I'm Robert M. Dohrmann; with me is Terri A. Tucker from Schwartz, Steinsapir, Dohrmann & Sommers, appearing for the defendant union.

THE COURT: Good afternoon. I think this one is probably the end of the road, so with that I'll tell you why.

MR. MARGOLIS: Well, I hope, Your Honor, we can talk about it a bit.

THE COURT: Well, we talked about it last time, and that's why we had another time, but I think this one is it. You are very persuasive, and you are very knowledgeable at argument. I say that as a compliment. I assume you take it that way. At argument you're able to produce doubts that have a tendency not to survive the papers. This time I think

the papers are relatively clear. I think the papers -- notwithstanding the way you've characterized the things that have been added to them, that you have not controverted them. And I think that the job the union did in making up its mind, whether and how to pursue this thing, was a substantive job, and was, while I think in error, still not -- not an inadequate effort to get the right answer, and I don't think it was a ministerial error. There's no suggestion in the papers I've reviewed that it was a ministerial error not to file a grievance. It was a conscious decision to go about it in a different way, if and when such time, if and when review and subsequent events made it look like it would be a successful grievance. I don't think -- I didn't then, I don't think now -- that just everybody, lawyers included, good lawyers included, would have had to see

that complex of contracts the way I see them. And I am not critical of the effort, the decision to review the thing in the way it was reviewed, or the efforts that went behind it. It's not only that I'm not outraged by it, I'm not even critical of it.

MR. MARGOLIS: May I, Your Honor?

THE COURT: Yes; briefly.

MR. MARGOLIS: All right, Your Honor. Your Honor, it is now undisputed that the union specifically told the employees not to file grievances. Now, I understand that the union had offered an explanation, although I point out, Your Honor, that there's no evidence that that was in fact what the union did; it's simply argument of counsel. But the union took what was an unprecedented step as far as the record is concerned of instructing the employees not to file grievances, even though the union

followed a policy of encouraging even meritless grievances to be filed. Now having taken that step, Your Honor, we look to what the union then did. There is no evidence, despite the misleading footnote 3 on page 10 in the union's brief, reply brief. There's no evidence that a decision ever was made within the time limits of the grievance.

THE COURT: That's correct.

MR. MARGOLIS: Now, if a decision was not made within the time limits of the grievance, the contractual rights expired without a conscious decision. In other words, it's exactly a Dutrisac type of situation where regardless of whether there may be statutory rights under the National Labor Relations Act, Your Honor, the employees' contract rights were extinguished, completely and absolutely by the union's ministerial failure to file the grievance. The reason it was

ministerial, Your Honor, is that no decision had been made as of the time that the grievants' time limits expired.

THE COURT: I don't read the papers that way: sorry.

MR. MARGOLIS: Excuse me, Your Honor?

THE COURT: I don't read the papers that way.

MR. MARGOLIS: May I ask whether Your Honor is disagreeing about whether the time had expired before --

THE COURT: No; no; no. It's clear the papers are clear about that.

MR. MARGOLIS: It's clear that the union had no decision before the time expired?

THE COURT: No: no; no. It is clear, I believe in the papers -- and I don't see how they can make it much more clear -- that a conscious decision was made not to decide --

MR. MARGOLIS: Let me address that, your Honor. The only evidence to which the union points about the time at which that decision was made was the text accompanying footnote 3 on page 10 of their reply brief, where they say that Mr. Rothner completed his investigation within the 10-day time limit. However, the footnote is not a cite to the record, it's a cite to a portion of the record where Mr. Rothner --

THE COURT: And, indeed, I didn't pay attention to that particular one.

MR. MARGOLIS: There is no other evidence of the time in which the --

THE COURT: I think M. Rothner's affidavit, declaration, is evidence of that. Let me tell you what I think.

MR. MARGOLIS: All right, Your Honor.

THE COURT: And you're going to have a lot of trouble persuading me otherwise. These people -- by the case that you've

made, and indeed by my own observation -- these people were not individually able to persuade on a grievance basis, weren't likely to be able to pursue effectively on a grievance basis, this particular kind of a claim. If it was going to be a good claim, it was going to be a good claim on principles that were not going to be easily understood by this group of people. I find it not at all surprising, nor at all subject to criticism, that while they were looking into that they were saying to the individual, "If true, don't file a grievance, because there isn't any way for you to pursue it. The union is going to have to do it, and we'll have to make our decision." I think it's also apparent from the papers that the union then said, "We can't do it on that kind of a time frame, either, and we're going to want to have, before we decide whether to extend our resources

and then do the sort of things that they would have to do, we're going to want to have some subsequent information; we're going to want to know what happened in fact to production; we're going to want to know what happened in fact to the number of employees; we're going to want to have made the case better than we're going to be able to make it in the 10 days." It appears to me, rather clear, that that kind if inquiry was made within the 10 days, and they decided that they didn't want to be going down that road because they couldn't get there in time. That does not strike me as an indefensible position. Not only is it not indefensible, in my judgment, it's probably correct. And they succeeded. In any practical sense they succeeded, vis-a-vis the employer, precisely because they did it that way.

MR. MARGOLIS: Succeeded, Your Honor? I misunderstand.

THE COURT: They survive summary judgment, and I believe ultimately succeeded against the employer. In other words, the decision made not to rush off into the arbitration, into the grievance kind of procedure, number one, not by letting the employees do it since there was no way they could pursue it on their own; number two, for the union not to get itself committed to that course was not, in my judgment, inappropriate. The fact that it was possible to have a success for the benefit of the employees after the fact suggests to me that it wasn't a bad decision to go that way. The fact that you did it rather than the union, and you got there because the union never did, simply suggests a better analysis by the people that wound up representing these employees individually than by the

union, if true. But I'm not at all critical of the way the union went at it. I just simply don't think they should be subjected to this case any more because I don't think they did anything wrong.

MR. MARGOLIS: You Honor, putting aside the ministerial question then, coming to the investigatory portion, and we follow through on the analysis of the case that Your Honor has adopted, then the issue is to what extent the union made an appropriate investigation into the alter ego question. Now, Your Honor, the union has admitted that the investigation conducted within the month before Mr. Holeman came back from vacation and Mr. Rothner reported to him, was insufficient to determine that question, because --

THE COURT: No. What it was, it was deficient on the face of it, to say that they shouldn't commit themselves to a

course of action that early, and which I agree --

MR. MARGOLIS: Which left open the question -- and Mr. Rothner has specifically testified to this -- that he advised Mr. Holeman that additional information should be whether there ought to be an affirmative duty to go out and get it, or at least that the union ought to be receptive to attempts to convey information regarding the alter ego situation; that is, after the mid December date. And it's undisputed that no move of any kind whatsoever was made to attain that additional information. In this regard, Your Honor, particularly to clarify the records, I want to point out two things. One is that the declaration submitted as Exhibit A to the Terri Trucker declaration, which is a National Labor Relations Board affidavit, is not signed under penalty of perjury,

so although it is competent as admission, it's not competent as evidence. However, in there it does admit, after talking to its attorney, there was no investigation of any kind by the union into the very facts which the attorney had instructed Mr. Holeman were dispositive of the issue, and as to which there was insufficient evidence at the time. Second, Your Honor, there's undisputed record evidence that my clients telephoned the union many, many times. Now Ms. Tucker has submitted a declaration saying that she reviewed phone logs; but, Your Honor, again we object to that as incompetent evidence. There's no foundation laid about the manner in which the phone logs were kept and so forth. Or in fact what it does do is raise the inference, in the absence of a declaration denying my client's testimony from the competent people, that

the union treated my people, calls from my people, differently from normal calls; they kept not messages, if in fact Ms. Tucker's review was of the appropriate documents. But what this establishes is that, first, the union did nothing affirmative to obtain the information which its own attorney said was necessary to evaluate the situation. Second, the union put up an absolute roadblock to any information from my clients by refusing to contact with them. And third, although the union had at least one union member actually at work at the post-sale facility, the union never made any inquiry of him regarding what the situation was as far as the relevant criteria; that is, questions such as continuity of supervision, continuity of business enterprise, so on and so forth. So even if it were true that missing the grievance deadline was of no moment,

which of course we dispute, by the union's own admissions it failed to do exactly what it's own attorney instructed it it had to do in order to evaluate the situation appropriately. I take it, Your Honor, I've not persuaded you.

THE COURT: No. I won't take anybody's time to make much of a record of this, nor do I do it for the purpose of making a record. I prefer to be understood. As I understand the analysis done, the analysis done was that the things in the documents which were represented to be true, and has turned out to be true, suggested that the sale for purposes of successor clauses was legitimate; that the analysis that ultimately led me to conclude that that wasn't true -- I'm not critical of the effort done in that regard. So then you have them saying, the lawyers saying, "You can't do it now. If you're ever

going to attack that, you've got to do it later. You've got to do it by way of subsequent evidence, if any." I don't find on the strength of this record, an affirmative duty on the part of the union to do more than it did do, vis-a-vis trying to establish that without some color of reason to believe it. And the only color of reason to believe what I've heard is the reason to believe that would have followed from these plaintiff's telephone calls as to those subsequent events, it true and if they had that information. It is not clear that that's the information they were calling about. And even if it were, it's not clear to me that that would represent a failure of duty by the union. The threshold consideration, as I understood him, was the deal as a deal is okay, if they don't screw it up with later actions. You're not going to have anything to argue

about, so don't start fighting it right now. But if they screw it up later, then they may have something to argue about. That's what I understood from the papers, the advice given to be. And I don't think what they did or failed to do after the fact about following that up amounts to the kind of conduct that would breach the duty of fair representation.

MR. MARGOLIS: You Honor, I don't want to waste the Court's time, but I perceive what may be an important -- I don't mean to say misunderstanding of what the threshold question was -- but the union's investigation was solely of the transaction.

THE COURT: I understand.

MR. MARGOLIS: It had nothing to do with the facts which are material to the alter ego issue. What was on the papers could hurt the company from an alter ego

standpoint, but was not going to be dispositive of the alter ego question.

THE COURT: Of course.

MR. MARGOLIS: It is not that any communications regarding the transaction or descriptions of the transactional documents would supply the material facts; it does not. There's nothing in the transactional documents that addresses the question of continuity of supervision; there is nothing --

THE COURT: And there has been no holding yet about that, because the holdings that had been made all went to transactional documents.

MR. MARGOLIS: Quite right, Your Honor. But because these issues, for example, continuity of actual operations, continuity of supervision, continuity of control of labor relations on a day-to-day basis, because these issues were not reflected and would not normally be

reflected in the transactional documents when the union limited its inquiry to the transactional documents on the theory that it intended to explore, or it was evaluating an alter ego issue, it didn't do --

THE COURT: I'm going to cut this off now.

MR. MARGOLIS: Very good, Your Honor.

THE COURT: I'll let you have the last word. It's got to be equally as short as this second to the last word. What I think is that you're advancing the bald proposition that the union is always on a duty of inquiry to subsequent fact, which it couldn't responsibly be expected to learn within the 10-day period. They're always on a duty of inquiry, positive inquiry, as to subsequent facts on a successor question. I simply don't see any law to affect that.

MR. MARGOLIS: I mean that only where, Your Honor, the union has taken it upon itself to take away from the employees by specific instructions their own individual right to grieve.

THE COURT: I understand that, and for the reasons that I said I don't agree with it.

MR. MARGOLIS: Then my last point is, Your Honor, regarding discovery, I assume that Your Honor has already evaluated the question.

THE COURT: Yes.

MR. MARGOLIS: But there are lots of documents identified in the various depositions regarding, for example, the timing of this and that; there is a lot of discovery yet to be done with respect to policies and practices. As we pointed out, each of the policies of the union, with respect to grievance handling that we can identify, was not followed. It

suggests that additional discovery regarding those policies, which has not occurred before this date only because of scheduling problems regarding depositions, would be fruitful in showing those kinds of breaches. Also, Your Honor, with respect to the alter ego question, but I take it my 56(f) is denied, too?

THE COURT: Yes.

MR. MARGOLIS: Very good, Your Honor.

THE COURT: Thank you.

MR. DOHRMANN: Your Honor, we filed and served an order; has the court come to a conclusion whether that order is in sufficient form to file?

THE COURT: I don't know that I've heard any objections to it. I'll give you an opportunity to object. And to be honest, I have not reviewed it.

MR. DOHRMANN: Thank you.

THE COURT: I think I looked at it, but I assumed he might have some objections.

MR. DOHRMANN: You Honor, would you permit me quickly to close the record on this moment by saying something that Mr. Margolis will agree with, which is, after 12 years of handling these kinds of cases for unions, I have not seen a more dedicated or innovative lawyer than Mr. Margolis has been in this proceeding.

MR. MARGOLIS: Thank you, Mr. Dohrmann.

THE COURT: I hope I said something that sounded like that. I've been very impressed. Otherwise, we wouldn't still be here.

MR. MARGOLIS: Your Honor, could we at least send you a bill for educating on this? May I have 30 days to review the order, Your Honor?

THE COURT: Sure.

MR. MARGOLIS: Or 15 days?

THE COURT: Sure.

CERTIFICATE

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPTION, REPORTED TO THE BEST OF MY ABILITIES, OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

6/3/87
DATE

TERRY KRAMER
CERTIFIED
VERBATIM
REPORTER

[COLLECTIVE BARGAINING AGREEMENT]

[EXCERPTS]

ARTICLE I

(RECOGNITION OF THE UNION)

Section 1. The Employer recognizes the Union as the representative for purposes of collective bargaining as to wages, hours and working conditions on behalf of all production workers except Operating Engineers, Teamsters, Office and Clerical Workers, Non-working Foreman, and any and all supervisory employees who do not perform any duties covered by this Agreement.

Section 2. The Employer agrees to prominently display the Union Shop Card at all times in one or more places.

Section 3. This is mutually agrees that only employees doing work that comes under the jurisdiction of Provisions House Workers Union Local No. 274, AFL-

CIO, shall be allowed to perform work as provided for in this Agreement.

ARTICLE XXIII

(GRIEVANCE AND ARBITRATION)

[Sections 2-4 only]

Section 2. Employees shall not be suspended, dismissed, demoted or disciplined without just and sufficient cause. The maximum time of a suspension shall not exceed the balance of the work week in which it occurs, plus one additional work week. Any employee who believes he has cause shall file a written grievance with the Company and the Union within (3) working days after the action taken by the Employer.

Section 3. All grievances of an employee or the Union, except those specified in paragraph 2 above, which allege a violation of any provision of this Agreement shall be filed in writing with the Employer and the Union within

ten (10) days after the event giving rise to the grievance. The parties hereto shall exercise every amicable means to settle or adjust all grievances filed within the time limits set forth in this Article. In the event of a failure to accomplishthe settlement or adjustment thereof within five (5) working days after the filing of any grievance with the Employer, The Union may by written notice to the Employer, request that the matter be submitted to arbitration. Such notice shall be delivered to the Employer as soon as possible, and in any event no later than twenty (20) working days after the filing of the written grievance unless such time is extended in writing by the employer.

Section 4. All grievances and requests for arbitration not filed with the Employer in the time Limits specified in this Agreement, or as mutually

extended or waived, shall be barred for all purposes. The Arbitrator shall not have the authority to ignore or execute any failure to comply with the time limits set forth is this article no matter what reason is advanced for any such failure, and any untimely grievance shall not be eligible for further consideration.

ARTICLE XXIX

(CHANGE IN OWNERSHIP)

Section 1. If an Employer hereunder sells, leases or transfers his business or any part therof, whether if be voluntary, involuntary, or by operation of law, it shall be his obligation to advise in writing the purchaser, lessee or transferee of the existence of this Agreement, of the requirement of this provision in particular, and of the names on the employees currently holding employment rights under this Agreement.

Section 2. Such purchaser, lessee or transferee shall be bound fully by the terms of this Agreement and shall be obligated to pay the wages, vacations, fringes, sick and accident benefits and comply with all other conditions of this Agreements effect at the time of the sale, lease or transfer. Such purchaser, lessee or transferee shall be obligated to continue this Agreement and the employment of those employed under this Agreement, including those subject to recall. The Union will similarly continue to be bound.

[LEO'S/TWC LEASE/SUBCONTRACTING AGREEMENT] [EXCERPTS]

[Lease Rider 3.1]

3.1 Term. The text of this Lease shall be for six (6) months commencing on November 15, 1984 and ending on May 16, 1985 with a series of five (5) option periods each for an additional six (6) month period to be mutually exercised by Lessee and Lessor prior to thirty (30) days before the expiration of the then current six (6) month term unless sooner terminated pursuant to any provision hereof.

[Subcontracting Contracts]

AGREEMENT

THIS AGREEMENT is made and entered into as of the 12th day of November, 1984, by and between LEO'S QUALITY FOODS, a California corporation, 1830-1850 West Slauson Avenue, Los Angeles, California 90047 (hereinafter referred to "LEO'S")

and THE WHITTINGTON COMPANY, a California corporation, 18301850 West Slauson Avenue, Los Angeles, California 90047 (hereinafter referred to "WHITTINGTON"), with respect to the following facts:

A. LEO'S is engaged in the business of selling processed meat and food products, which are prepared to the specific requirements of its customers.

B. WHITTINGTON is engaged in the business of preparing, cooking, slicing and packaging meat and food products for customers, and is sometimes known as a "contract manufacturer".

C. LEO'S requires assurance that its requirements for products will be provided by WHITTINGTON, and desires to utilize WHITTINGTON under the terms and conditions contained herein for the manufacture, preparing, cooking, slicing and packaging of the products contemplated by this Agreement.

D. Based upon the mutual assurances set forth herein, WHITTINGTON is willing to provide all of LEO'S requirements of Products, as defined, herein, provide it is the exclusive producer of the LEO'S Products contemplated by this Agreement, and LEO'S is willing to purchase all of the products produces pursuant to this Agreement on the terms set forth herein.

* * *

2. Term.

The term of this Agreement shall commence as of November 15, 1984, and shall continue for a term of six (6) months unless sooner terminated under the provisions of this Agreement. This Agreement, unless either party serves notice of intention to terminate this Agreement thirty (30) days prior to its expiration, shall remain in full force until either party shall serve thirty

(30) days notice on the other of its intention terminate this Agreement.

[TERMINATION NOTICE (11/16/84)]

LEO'S QUALITY FOODS

Reply to: Post office Box 54484

Terminal Annex, Los Angeles, California 90054

Telephone (213) 295-3251

TO ALL LEO'S EMPLOYEES:

As all of you know, Leo's Quality Foods has been suffering severe financial difficulties for the past five years.

I can no longer continue this struggle and have sold Leo's to a new company who will form its own business.

The plant is officially closed as of November 16, 1984, at which time I will no longer have any interest in the business. All production employees are terminated effective this date.

I am advised by The Whittington Company, which will begin operations, that it will welcome applications for employment submitted by former Leo's employees. If

you wish to submit an application or inquiry about employment opportunities, you should contact The Whittington Company directly at 213/265-7745.

I thank all of you for your loyalty and wish you well.

[Spanish Translation Omitted]

JULIUS BELL

[DECLARATION OF GLENN ROTHNER]

I, Glenn Rothner, declare:

1. [Identification] I am an attorney admitted to practice before this Court, and a member of Reich, Adell & Crost, counsel to defendant United Food and Commercial Workers Union, Local 274, ALF-CIO & CLC ("Local 274") in this action. This law firm has represented Local 274 since June 1984. I have been a practicing attorney since 1975, and during that time have specialized exclusively in the representation of public and private sector labor unions.

2. [Notice of Leo's Sale] On November 16, 1984, I received a telephone call from Donald C. Holeman, Local 274's president. Holeman stated that he had met that morning with Fredric Richman, a prominent management labor law attorney, who represented Leo's Quality Foods, Inc. ("Leo's"). I was previously aware that

Leo's was party to a collective bargaining agreement ("Agreement") with Local 274. Holeman told me that the purpose of his meeting was Richman's announcement that Leo's was being sold, and all of its production employees terminated, effective that day. Holeman asked to meet with me concerning the ramifications of the sale. We scheduled the meeting for 1:00 p.m. on the following Monday, November 19, 1985, at my office.

3. [Meeting With Holeman] In our November 19, 1985, meeting, Holeman and I discussed available legal options in light of the Leo's sale. Holeman was interested in investigating whether the sale was in fact an arms' length transaction or whether Leo's was merely establishing an alter ego which would be obligated to abide by the agreement. He reported the information given to him by

Fredric Richman the previous Friday, particularly that Julius Bell, the long-time owner of Leo's, was leaving the business altogether. He mentioned the name Steve Whittington, whom Richman had identified as the primary purchaser. I do not recall any other specific information that Holeman relayed to me; rather, he asked me to contact Fredric Richman directly to discuss the structure of the sale.

Holeman and I also discussed possible legal action under the Agreement. Holeman had brought with him a copy of the current Agreement, and I looked at the successorship clause found in Article XXIX. I gave Holeman my opinion that Article XXIX was a relatively weak successorship clause. Holeman knew, and I reiterated, that such a clause did not have effect of binding the purchaser the substantive terms of

the Agreement under the rule of Howard Johnson Co. v. Detroit Joint Executive Board, 417 U.S. 249, 94 S.Ct. 2236, 41 L.Ed.2d 246 (1974). We also discussed what duty the seller had under this successorship clause. I told him that the seller's only duty, under Article XXIX, was to notify the purchaser of the Agreement's existence, and that Leo's almost certainly would have complied with that requirement. Holeman said that Fredric Richman had verified that notice was given. I also suggested that pursuing a grievance against the seller alone might prove futile, in view of Leo's ongoing financial problems.

I also remember discussing general matters of strategy with Holeman. I told that him that, given the present state of successorship law, it is often best for a union to refrain from taking immediate action, while waiting for the

purchaser to hire its workforce. If the purchaser hires a majority of the former employees, the union can assert a duty to bargain based on the successorship doctrine. I told Holeman that in my experience, aggressive action by the union at the time of the sale often only alerts the purchaser to the union's claims and makes it unlikely that the existing work force will be retained.

Holeman and I agreed to talk again after I contacted Richman. Our meeting lasted approximately 40 minutes.

4.[Conversation With Richman] I talked to Fredric Richman later in the week beginning November 19, 1984, although I do not remember the exact day. I do remember that we exchanged phone messages several times before finally talking. I had known Richman professionally for at least five years, both in his capacity as a management

lawyer and a labor arbitrator. I had, and have, a good working relationship with Richman and consider himto be a lawyer of high ethical standards.

I asked Richman to describe to me the details of the Leo's sale, and told him frankly that local 274 was looking for evidence that the purchaser was and alter ego. Richman then described the structure of the sale, emphasizing that Julius Bell, who had owned almost all of the stock in Leo's, was selling out completely. He indicated that the Leo's corporate entity would continue to exist because of the goodwill attached to Leo's name and the need to preserve a loose-carry forward for tax purposes. The production end of the business, however, would be operated by a company owned solely by an individual he identified as Steve Whittington, who had never before been involved in Leo's.

Richman and I discussed the nature of the sale for approximately 15 minutes. I do not recall all of the details Richman describes, but by the end of the conversation I was thoroughly convinced that it would be futile to pursue a theory that Leo's and its purchaser were alter egos. Richman offered to let me see copies of the sale agreement and escrow documents. Because I had no reason to doubt his representations, I said that that would not be necessary.

5. [Report to Holeman] I called Holeman at Local 274's office to report on my discussions with Richman. The conversation took place in mid-December, after Holeman returned from vacation. I told him that, based on what Richman had told me, we could notbind the new entity to the Agreement as an alter ego. Based on that advice, Holeman decided to follow the strategy we had discussed in our

earlier meeting: to monitor the new company's hiring of employees and, if possible, to assert its duty to bargain. Barring that, Local 274's only option was to organize the new operation. This conversation lasted approximately 10 minutes.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 10th day of January, 1986, in the County of Los Angeles, State of California.

/s/

GLENN ROTHNER

[DEPOSITION OF GLENN ROTHNER] [EXCERPTS]

Page 121, Lines 12-21

Q. In there discussions, you must have had some notion in your mind of what the transaction was.

A. No. I had very little in mind. We were talking generally about the transaction. And this was ameeting at which my view of the purpose was to reorient Don to the extent he needed reorienting to the law in this area. And it was both his desire and my assumption we would have another discussion about this after I had had the opportunity to learn more about the transaction from Fred Richman.

Page 143, Lines 21-24

Q. You did not know when you met with Don Holeman on Monday the 19th whether there was any merit to a grievance, correct?

A. Correct.

[DEPOSITION OF DONALD HOLEMAN]

[EXCERPTS]

Page 115, Lines 4-8

Q. Did you then on November 16 go to Mr. Richman's office?

A. Yes.

Q. What time did you arrive?

A. I think I got there about 8:30.

Page 16, Lines 5-27

Q. You sat down and you exchanged greetings again. And the Mr. Richman said what?

A. What he said? He says, "Leo is closing today." This can't be word-for-word. Just the substance. "Leo is closing today. They're selling out to a guy named Steve Whittington. He's a fella that is connected with this Herbal Life of Nurtralife or something like that. Julie Bell is completely out of it. He's sick." Basically that's what

he told me. He just couldn't make it any longer.

Q. And did you respond?

A. Yeah. We discussed a few things. You know, I tried to find out what I could about Steve Whittington. I couldn't find out much other than he antiunion a hundred percent, and that he would be possibly operating and using Leo's name. Among other things, he was planning on maybe -- I was told that he was putting -- would put part of his vitamin operation in there. It didn't seem to be too clear what he was going into, any facets of the meat business such as meat thawing which I had never heard about. ...

Page 119, Lines 14-21

Q. What did he say about Whittington's attitude toward the Union?

A. Antiunion.

Q. Tell me as best you can what he said as closely as you can remember.

A. That he's strictly antiunion. He fully intends to operate this building -- this company nonunion.

Page 133, Line 16 - Page 134, Line 21

Q. Between the meeting with Richman and the meeting on the 19th with the employees, did you take any action with respect to Leo's?

A. I don't know what you mean by any action.

Q. Well, did you do anything that related to Leo's?

A. Yes. I did.

Q. Tell me what that is.

A. I called our attorney on Monday morning and asked for a meeting to discuss the situation which was set up for that afternoon, that Monday afternoon.

Q. What attorney was that?

A. Glenn Rothner.

Q. And did you meet with your attorney?

A. Yes.

Q. That was Monday morning?

A. Afternoon.

Q. Monday afternoon. Was that after the meeting with the employees?

A. Yes.

Q. Other than that telephone call between the meeting with Fred Richman on the 16th and the meeting with the employees on the 19th, did you do anything with respect to Leo's?

A. No.

Q. When did the meeting with the employees start on the 19th?

A. I believe it was around 10:00

Q. Who was present?

A. About 75 people from Leo's approximately and myself. ...

Page 143, Line 18-22

Q. Did you then meet your attorney that afternoon?

A. Well, I talked to him. I can't remember if I -- If I went over there or it was over the phone.

Page 144, Line 3 - Page 146, Line 13

Q. How long did your conversation with your attorney last?

A. I don't know. I don't recall. I'd say more that five minutes, less than an hour.

Q. Would you, to the best of your recollection, describe that conversation.

A. I told him of my meeting with Fred Richman, my meeting with the membership, and my desire to find out whether of not we felt an alter ego situation could exist of did exist, and asked him to check with Fred Richman to get any information he could in that

regard so that we could make a determination.

Q. Did you tell Mr. Rothner that Mr. Richman had told you that his understanding was that Whittington would not hire any Leo's employees because of their union status?

A. Well, I told him that this guy is going to try to operate nonunion and would probably not hire very many if any of the old employees, in my opinion.

Q. Did you relate to him what Mr. Richman had told you about what he knew about Mr. Whittington?

A. Yes. I did.

Q. Did you ask Mr. Rothner to consider whether proceedings could be brought against Whittington for failure to hire -- Excuse me -- refusal to hire Leo's employees?

A. I don't recall.

Q. Do you recall if Mr. Rothner suggested that that might be a possibility?

A. Well, he did -- Well, not at this particular meeting. He didn't.

Q. Did you take notes of your meeting or conversation with Mr. Rothner?

A. No.

Q. Do you recall now wether you were present with him or on the phone?

A. I can't recall for certain.

Q. Do you recall what Mr. Rothner said in response to your remarks?

A. Well, he said, yes, he would investigate it with Fred Richman.

Q. Can you recall anything else about that conversation?

A. No.

Q. Have we exhausted your recollection of it?

A. Yes.

Q. Are you aware of anything that would refresh your recollection?

A. No.

Q. After that conversation with Glenn Rothner, what was the next action you took with respect to Leo's?

A. I talked with Glenn Rothner again.

Q. When did that occur?

A. Oh, it would be some time after December 12th, shortly after -- December 12th actually would be after. The 12th, 13th, 14th, 15th, 16th. Around the 17th of November or shortly thereafter.

Q. Is that the 17th of December?

A. I mean December.

Q. Did he call you?

A. No. I called him, I guess. I don't know. He may have called me in between.

[DEPOSITION OF A. ED DOMINGUEZ]

[EXCERPT]

Page 76, Line 4 through Page 77, Line 9

Q. Have you ever told a disgruntled employee not to file a grievance?

A. No, sir. . . . I always tell a grievant to file a -- excuse me. I always tell any member to file a grievance.

Q. Why is that?

A. That's his rights.

A. Would you consider it unusual for a union business agent or officer to tell a disgruntled employee not to file a grievance?

A. Yes.

Q. Why is that?

A. Because the policy of the union is that we want any member whose rights have been violated to file a grievance.

Q. Even in situations where the union might not think the grievance has merit?

A. Absolutely.

Q. Are you aware of any occasion on which any Local 274 officer or agent ever told any disgruntled employee not to file a grievance?

A. No.

Q. Would you be surprised to hear that there ever was such an occasion?

A. Yes.

Q. And that is because it would be inconsistent with the union's policy?

A. Yes.

[LOCAL 274'S SUMMARY JUDGMENT REPLY BRIEF] [EXCERPT]

Page 7, Line 7-24

The Union certainly had the right to initiate a grievance on behalf of the affected employees (see Exhibit 1 to the holeman Deposition, Article XXIII, Section 3) and the discretion to seek to streamline the grievance and arbitration procedure by discouraging individual grievances from the approximately 100 Leo's employees, and instead opting for a single grievance, which, if viable, would resolve the common issue of job security upon the sale of the Company. There can be no question but that the Courts have given Unions full rein in deciding how to administer their grievance procedures. See, e.g., Petersen v. Kennedy, 771 F.2d 1244, 1254-55 (9th Cir. 1985), cert. denied, ___ U.S. ___, 106 S.Ct. 1642, 90 L.Ed.2d 187 (1986) ("We have never held

that a Union has acted in an arbitrary manner where the challenged conduct involved the Union's judgment as to how best to handle a grievance.") Choosing to file or not to file a single grievance on behalf of all the affected employees would certainly be the most efficient and expeditious means of regaining the Leo's employees' jobs if such a grievance were viable.

DECLARATION OF ANTONIO LEMUS

(EXCERPT)

Paragraph 2

2. I was born on January 26, 1936. I was hired by Leo's Quality Foods ("Leo's") in May 1967 as a production worker in the meat processing and packing plant located at 1830-1850 West Slauson Avenue in Los Angeles, California. I became a member of the Union ("Local 274") in November 1967. I remained a member of Local 274 and was continuously employed by Leo's for the following 17 years, until my employment was involuntarily terminated on November 16, 1984....

DECLARATION OF CARMEN SALAZAR

(EXCERPTS)

Paragraph 2

2. I was born July 21, 1936. I was hired by Leo's Quality Foods ("Leo's") in June 1963 as a production worker in the meat processing and packing plant located at 1830-1850 West Slauson Avenue in Los Angeles, California. I became a member of the Union ("Local 274") in November 1963. I remained a member of Local 274 and was continuously employed by Leo's for the following 21 years, until my employment was involuntarily terminated on November 16, 1984....

[DECLARATION OF BEATRICE ORKIS]

[EXCERPTS]

[Paragraph 2]

2. I was born on December 27, 1931. I was hired be Leo's Quality Foods ("Leo's") in September 1956 as a production worker in the meat processing and packing plant located at 1830-1850 West Slauson Avenue in Los Angeles, California. I became a member of the Union ("Local 247") in January 1957. I remained a member of Local 274 and was continuously employed by Leo's for the following 28 years, until my employment was involuntarily terminated on November 16, 1984....

[Paragraph 10]

10. The first time I realized that my job security had not been secured by the wage and benefit concessions was on November 16, 1984, when I was terminated without ant advance notice.

(a) I reported to work on November 16, 1984 at 6:30 a.m. All of the meat was packed by approximately 1:00 p.m., and none of my normal duties remained to be done. My immediate supervisor, Tom Serrano, told my co-workers and me that we could not go home, but he refused to explain why.

(b) Mr. Serrano Told us to stay in the packing room. I went to the door of the cook room, and I saw armed guards posted at various places. During my 28 years at Leo's, I had never seen an armed guard on the premises before (except for the normal guard at the gate to the street), and it made me very nervous. I thought something very serious must be happening to me and my coworkers, but nobody would explain what was going on.

(c) At approximately 2:30 p.m., Tom Serrano finally gave permission for us to go home. Along with a number of my

coworkers, I was escorted off the premises by several other armed guards. I still had not received absolutely no explanation about what was going on and was at this point extremely upset and uncertain about what kind of trouble I might be facing.

(d) When I approached the Leo's Gate, in the company of my coworkers, I saw the plant manager, Sergio Pieri, and his assistant, Butch Yokoi, handing envelopes to each employee who passed through the gate. As I passed through, I was given an envelope, but neither Mr. Pieri nor Mr. Yokoi would say anything to me.

(e) I opened the envelope after I had passed through the gate. The envelope contained a check and a letter from Julius Bell. The letter, a copy of which is attached hereto as Exhibit C, stated in English That Julius Bell had

"sold Leo's to a new company who will form its own business", that the plant was closed, and that I was terminated effective immediately.

PLAINTIFFS' INTERROGATORY RESPONSES

(EXCERPT)

Page 3, Line 10 through Page 4, Line 9

On November 19, 1984, all Plaintiffs except Gerardo Lopez, Pascasio Medina, and Luis Torres attended a meeting at the Union's hall at which Don Holeman was the principal speaker. All Plaintiffs who were present recall that Mr. Noleman stated that the Union was as surprised as the employees about Leo's move, that the Union had no specific information about what was going on except that the Whittington Company apparently was taking over Leo's, that Mr. Holeman thought there was little hope, but that Mr. Holeman would be meeting with the Union's attorneys to see if anything could be done the employees could rely on the Union to do it, and that the Union would keep the employees informed. All Plaintiffs who attended the meeting,

except Hector Benavides, Carrie Herbert, and Filiberto Martinez, heard Mr. Holeman asked the specific question whether the employees should file written grievances. (Many Plaintiffs specifically recall that it was Beatrice Orkis who asked the question in English; others recall only Spanish translation of a question asking whether written complaints or grievances should be filed and have no knowledge of which employee asked the question.) All Plaintiffs who were present at the meeting, except Hector Benavides, Carrie Herbert, and Filiberto Martinez, heard Mr. Holeman state that no employee should file a written grievance, because the Union was fully in charge of the situation and would take all action that could be taken to protect the employees. All Plaintiffs who attended the meeting left the meeting with the clear understanding that the Union would take

any action that could be taken to protect their rights and that the Union would keep the informed.

Supreme Court, U.S.
FILED
APR 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 881573

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

RODRIGO ALONSO, et al.,

Petitioners

v.

LEO'S QUALITY FOODS, et al.,

Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION

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28pp

TABLE OF CONTENTS

		Page
TABLE OF AUTHORITIES	. . . . .	ii
I	STATEMENT OF THE CASE	1
II	REASONS FOR DENYING THE WRIT	17
	A. SUMMARY JUDGMENT FOR THE UNION WOULD BE PROPER UNDER ANY STANDARD	17
	B. PETITIONERS ARE SEEKING REVIEW ON AN ISSUE THEY DID NOT PRESENT TO THE COURT BELOW	22
III	CONCLUSION	25

TABLE OF AUTHORITIES

Page

CASES

Federal

Galindo v. Stoody Co., 793 F.2d 1502 (9th Cir. 1985) 24

G.D. Searle & Co. v. Cohn, 455 U.S. 404, 102 S.Ct. 1137, 71 L.Ed.2d 250 (1982) 25

Howard Johnson Co. v. Detroit Joint Board, 417 U.S. 249, 94 S.Ct. 2236, 43 L.Ed.2d 246 (1974) 5

U.S. v. Ortiz, 422 U.S. 891, 898, 95 S.Ct. 2585, 45 L.Ed.2d 623 (1975) 25

I

STATEMENT OF THE CASE

Leo's Quality Foods, Inc. ("Leo's" or "the Employer") was, until November 1984, a meat and poultry processor in Los Angeles, California. For more than twenty years prior to that time Leo's had been party to collective bargaining agreements with United Food and Commercial Workers Union, Local 274, AFL-CIO ("the Union" or "Local 274") covering Leo's production employees. On November 16, 1984, Leo's attorney, Frederick Richman, informed Donald Holeman, the President of Local 274, that Leo's was closing down its business, effective that day.

Richman told Holeman that Leo's assets were being sold to an individual named Steven Whittington, and that its former owner, Julius Bell, was to be completely divorced from the new operations. Richman also told Holeman that Whittington might continue to use the Leo's name but

was not likely to hire any of its employees and that, while Whittington was aware of the collective bargaining agreement with the Union, he apparently did not intend to execute a successor contract.[1/]

Holeman immediately arranged for an emergency membership meeting to be held the following Monday. Some 75 of the 100 or so Leo's employees attended this meeting, where Holeman related what Richman had told him and informed the workers that the Union's attorney would conduct an investigation to determine if any grounds existed for claiming that Whittington's new operation was Leo's "alter ego." Holeman cautioned the employees, however, that the sale to Whittington did not appear to be a sham entered into merely to

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[1/] Holeman Deposition, Union's Supplemental Excerpts of Record, pp.2-6, 8-14. All references to documents contained in the Union's Supplemental Excerpts of Record provided to the Court of Appeals are indicated by "[name of document], Supplemental Excerpts of Record, p. __."

avoid the Union contract.[2] He also urged the workers to apply for jobs with the new company, informed them of their rights under the collective bargaining agreement, and urged them to file grievances if they had any claims regarding payment of wages or monies owing to them.[3] The meeting lasted about an hour and a half.

After the meeting Holeman met with the Union's counsel, Glenn Rothner, an experienced labor attorney,[4] to discuss the closure and sale and the strategies available to the Union. Among the strategies they discussed was the possibility of filing a grievance under Article XXIX

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[2] Holeman Deposition, Union's Supplemental Excerpts of Record, pp.20-22.

[3] Holeman Deposition, Union's Supplemental Excerpts of Record, pp.20-23.

[4] Rothner Deposition, pp. 8-54, CR 82. All references to documents in the Certified Record on appeal to the Court of Appeals for the Ninth Circuit that are not included in either the Union's Supplemental Excerpts of Record or the Petitioners' Appendix are indicated by "[name of document], CR [docket number]."

of the collective bargaining agreement between Leo's and the Union.5/ After reviewing this language, they concluded that the Union did not have a viable suc-

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5/ That Article provided:

> **CHANGE IN OWNERSHIP**
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> Section 1. If an Employer hereunder sells, leases or transfers his business or any part thereof, whether it be voluntary, involuntary, or by operation of law, it shall be his obligation to advise in writing the purchaser, lessee or transferee of the existence of this Agreement, of the requirement of this provision in particular, and of the names of the employees currently holding employment rights under this Agreement.
>
> Section 2. Such purchaser, lessee or transferee shall be bound fully by the terms of this Agreement and shall be obligated to pay the wages, vacations, fringes, sick and accident benefits and comply with all other conditions of this Agreement in effect at the time of the sale, lease or transfer. Such purchaser, lessee or transferee shall be obligated to continue this Agreement and the employment of those employed under this Agreement, including those subject to recall. The Union will similarly continue to be bound.

cessorship claim against either Leo's or Whittington. As Rothner explained to Holeman, in his opinion section 1 did nothing more than obligate the seller to notify the purchaser of the collective bargaining agreement, which Leo's had apparently done, but did not require the purchaser to adopt it or require adoption as a condition of sale.[6] As for section 2, Rothner advised Holeman that, in his opinion, this section was unenforceable under federal labor law, and in particular under the Court's decision in Howard Johnson Co. v. Detroit Joint Board, 417 U.S. 249, 94 S.Ct. 2236, 43 L.Ed.2d 246 (1974), as against a purchaser who did not agree to adopt the collective bargaining agreement.[7]

Rothner and Holeman discussed the other strategies available to the Union:

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[6] Rothner Deposition, Supplemental Excerpts of Record, p.40.

[7] Rothner Deposition, Supplemental Excerpts of Record, pp.28, 29, 30-31, 40.

(1) demanding the right to bargain with Whittington for a new collective bargaining agreement if a majority of the new workforce came from the Leo's bargaining unit,[8] (2) filing charges with the National Labor Relations Board if they had evidence that Whittington had refused to hire the Leo's employees because of their membership in the Union or their former employment by Leo's,[9] and (3) claiming that Whittington was bound to the existing Agreement between Leo's and the Union as the "alter ego" of Leo's.[10] The Union had no evidence at that time to support either of the first two claims.[11] As for the third theory, Holeman asked Rothner to

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[8] Rothner Deposition, Supplemental Excerpts of Record, p. 39.

[9] Rothner Deposition, Supplemental Excerpts of Record, p. 34.

[10] Rothner Deposition, Supplemental Excerpts of Record, p. 35.

[11] Rothner Deposition, Supplemental Excerpts of Record, p. 36.

investigate whether the new company could be bound by an alter ego theory.12/

Both Holeman and Rothner believed that it would be counterproductive to file an alter ego grievance before they had the evidence to support it.13/ As Rothner pointed out to Holeman, a premature alter ego claim might cause the purchaser to hire even fewer Union members than it would have otherwise.14/ Furthermore, the Union would be in a much stronger position to acquire evidence to support an alter ego claim if it had members working inside the new company.15/ Holeman asked Rothner to call Richman, the Employer's attorney, to obtain more information concerning the transaction and the new operation.

12/ Rothner Deposition, Supplemental Excerpts of Record, p. 35.

13/ Rothner Deposition, Supplemental Excerpts of Record, pp.43-44.

14/ Rothner Deposition, Supplemental Excerpts of Record, pp.43-44.

15/ Rothner Deposition, Supplemental Excerpts of Record, pp.44-46, 75-76.

Rothner called Richman later that week. In that conversation Richman told Rothner that Julius Bell was selling his interest in Leo's and getting out of the business entirely. The Leo's corporate entity would survive so that the purchaser of the failing business, Whittington, could benefit from both the goodwill associated with the Leo's name and a tax loss carry-forward under the Internal Revenue Code. Whittington would take fifty percent of the Leo's stock and Bell's son Robert, who heretofore had only a nominal interest in Leo's, would take the other fifty percent.16/

Richman informed Rothner, however, that Leo's would no longer be in the business of processing meat, but would now become strictly a marketing operation. The meat processing operation would be handled by Whittington's wholly-owned new

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16/ Rothner Deposition, Supplemental Excerpts of Record, pp.53-54, 57, 59.

company, The Whittington Company ("TWC"), which would in turn supply the Leo's marketing operation. Richman told Rothner that TWC would not necessarily be doing the same kind of meat processing as had been done at Leo's facilities. Rothner knew that Whittington had had no involvement in the direction of labor relations at Leo's, and was informed that Julius Bell, who had directed labor relations for his company, would not perform any work for Whittington's new company.17/

Richman offered to provide Rothner with the transactional documents. Rothner declined.18/ As discovery later revealed, all of Richman's representations proved to be true. The transaction between Leo's and Whittington was precisely as Richman

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17/ Rothner Deposition, Supplemental Excerpts of Record, pp.53-58.

18/ Rothner Deposition, Supplemental Excerpts of Record, p.59.

had described it[19] and Julius Bell has played no part in the business of either Leo's or TWC since the sale.[20]

After this discussion with Richman, Rothner reached the conclusion that no viable alter-ego grievance could be filed because the critical elements of an alter ego claim under federal labor law--continuity of management and continuity of control of labor relations--were missing. Rothner reviewed the question with two attorneys in his office to see if he had missed any plausible theories or promising strategies and then did additional research into these issues. His conclusion remained the same.[21]

Rothner testified that, as the Union's attorney, he had the authority to

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[19] Rothner Deposition, Supplemental Excerpts of Record, p.60.

[20] J. Bell Declaration, pp.7-8, Supplemental Excerpts of Record 5.

[21] Rothner Deposition, Supplemental Excerpts of Record, pp.56-57, 65, 68, 71, 72.

file, and indeed would have filed a grievance alleging that Whittington was an alter ego of Leo's if he had concluded that such a grievance could be supported.22/ If he had seen a viable grievance and Holeman could not have been reached, he either would have contacted another responsible Union official or would have taken it upon himself to make a timely claim under the contract.23/ Rothner chose, however, not to pursue what he believed was a futile claim.24/

Rothner advised Holeman of his conclusion when the latter returned from vacation. At that point they decided to continue monitoring the new company's hiring of Leo's former employees in order to develop evidence for a future

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22/ Rothner Deposition, Supplemental Excerpts of Record, p.64.

23/ Rothner Deposition, Supplemental Excerpts of Record, p.64.

24/ Rothner Deposition, Supplemental Excerpts of Record, p.65.

successorship or alter ego claim.[25] The Union's monitoring, however, turned up no evidence that either Julius Bell or his son Robert was playing any role in managing TWC or in setting labor relations policy for that company. In the absence of any such evidence of continuity in management or labor relations policy, the Union did not believe it could prove that TWC was an alter ego of Leo's.

On or about May 15, 1984 one of the Petitioners, represented by counsel for Petitioners, filed charges with the National Labor Relations Board against the Union, alleging breach of the duty of fair representation, and against Leo's, alleging that the Whittington Company was an alter ego of Leo's. Petitioners' counsel withdrew both charges after the Board

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[25] Rothner Deposition, Supplemental Excerpts of Record, pp.75-76.

informed the charging party that there was no basis to proceed.[26]

This lawsuit followed. Petitioners named Leo's, TWC, Julius Bell, Robert Bell, Arline Bell, Steven Hawk, Stephen Whittington, Eileen Whittington and the Union. Petitioners alleged that all of the defendants, save the Union, were alter egos of one another and that they had violated the collective bargaining agreement by selling the Company and discharging the Petitioners in connection with this sale. The Petitioners alleged that the Union had breached its duty of fair representation by not challenging the sale or discharges in arbitration. The Complaint's fifth cause of action charged the Employer Defendants with intentionally inflicting emotional distress on the

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[26] Declaration of Terri A. Tucker, Exhibits "A," "B," "C," and "D," CR 70.

Petitioners by the manner in which they discharged the Petitioners.[27]

The District Court initially denied the Union's motion for summary judgment on Petitioners' fair representation claims.[28] Following the Petitioners' separate settlement of their claim against Leo's, TWC and the individual defendants, the Union moved to strike Petitioners' demand for a jury trial and to dismiss their claim for damages for emotional distress. The District Court granted these motions.[29] The Union then renewed its motion for summary judgment, which the District Court granted.

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[27] The Petitioners subsequently amended their Complaint to allege additional causes of action. The only new cause of action against the Union, which alleged age discrimination on its part, was dismissed by the District Court. CR 52. Petitioners did not appeal from that dismissal.

[28] CR 52.

[29] CR 80.

In ruling for the Union, the District Court held that Rothner acted reasonably in relying on Richman's description of the transaction and in analyzing the law applicable to this situation. The Court further held that Rothner's conclusion that no viable claims could be asserted under the collective bargaining agreement was reasonable.[30/] As the District Court stated, in ruling from the bench, while the court might have made a different assessment of the transaction than the Union did,

> I don't think . . . that everybody . . . would have had to see that complex of contracts the way I see them. And I am not critical of the effort, the decision to review the thing in the way it was reviewed, or the efforts that went behind it.

30/ Supplemental Findings, Appendix, p.17.

It's not only that I'm not outraged by it, I'm not even critical of it.[31]

The Court of Appeals affirmed the judgment in an unpublished decision. The Court of Appeals held that the Union did not act either discriminatorily or in bad faith in deciding not to pursue an alter ego claim that it did not believe it could support,[32] that the Union's investigation and handling of this alter ego claim was not inadequate or perfunctory,[33] and that further investigation would not have produced a different result.[34]

Because of its decision on the merits of Petitioners' fair representation claim, the Court did not reach the District

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[31] Reporter's Transcript of Hearing, Appendix, pp.24-25.

[32] Memorandum Decision, Appendix p. 11.

[33] Memorandum Decision, Appendix pp. 12-13.

[34] Memorandum Decision, Appendix pp.13-14.

Court's rulings on the jury trial and emotional distress issues.[35] Petitioners subsequently moved for reconsideration, which the panel denied without further briefing or opinion.[36]

II

REASONS FOR DENYING THE WRIT

A. SUMMARY JUDGMENT FOR THE UNION WOULD BE PROPER UNDER ANY STANDARD.

The Petitioners claim that *certiorari* is necessary in order to resolve the alleged conflict between the Circuits regarding "whether gross negligence is sufficient conduct so as to breach the duty of fair representation." (Petition, p.20) They further argue that this case is "a good vehicle" for resolving this

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[35] Memorandum Decision, Appendix p. 14.

[36] Order Denying Rehearing, Appendix p.1.

alleged conflict because of its unique factual and procedural setting. (Petition, p.33) But this case is, in fact, entirely inappropriate for this purpose, since judgment for the Union was proper under any conceivable standard.

This case does not turn on any distinction between "gross negligence" and "intentional misconduct." As both the District Court and the Ninth Circuit held, the Union's handling of this grievance was reasonable. That holding satisfies any standard--"negligence," "gross negligence" or "intentional misconduct"--imposed by any Court.

The critical facts are not in dispute: the Union's president directed Rothner to investigate the merits of an alter ego claim, Rothner spoke with the Employer's attorney several days later, and, based on that discussion and his analysis of the law, concluded that the Union did not have any viable successor-

ship or alter ego claims. The Union elected, on the basis of Rothner's analysis, not to file a grievance.

The District Court held that Rothner was justified in relying on Richman's explanation of the transaction, that Rothner's analysis of the merits of an alter ego claim was reasonable, and that his conclusion that the Union did not have a viable grievance was reasonable.37/ The Ninth Circuit affirmed, finding that the Union did not ignore a meritorious grievance or handle it in a perfunctory manner. It rejected the Petitioners' complaints that the Union failed to obtain copies of the transactional documents, return their telephone calls or investigate the identity of management and supervisory personnel by noting that in no case would further investigation have produced any facts

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37/ Supplemental Findings of Fact and Conclusions of Law, Appendix, p.17.

that would have altered or influenced the Union's decision.[38/]

The Ninth Circuit clearly did not consider the Union's investigation to be "negligent but excusable." On the contrary, the Court of Appeals' determination that further investigation would not have produced a different result establishes that the Union did everything that could be expected of it in these circumstances.

While the Petitioners complain that the Court should have judged the Union's conduct by a "gross negligence" standard, they have not suggested anywhere in their Petition just how they would have obtained a different decision if the Court of Appeals had applied that (or any other) standard. That omission is telling, for it shows just how little their Petition has to do with any overarching issues of general significance.

38/ Memorandum Decision, Appendix, pp.13-14.

Instead their Petition is almost entirely devoted to a single factual issue that is unique to this case and that has nothing to do with any conflict in the Circuits. The Petitioners insist that the Union must have made the decision not to file a grievance without conducting any investigation because Holeman was on vacation when the last day to file a grievance passed. Petitioners ignore the salient fact that it was Rothner, not Holeman, who decided, based on his investigation of the facts and analysis of the law, that the grievance did not have merit. Petitioners likewise do not mention Rothner's uncontradicted testimony that he could and would have filed a grievance if he had felt that the Union had any viable alter ego claim. The Petitioners' "failure to investigate" theory simply cannot be squared with the uncontroverted facts.

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But even if their theory had some merit, this would still not be an appropriate case for *certiorari*. Petitioners' claim involves issues of interest only to the parties involved in this action, rather than issues of general significance. There is no reason for this Court to grant *certiorari* in order to review an issue which the Petitioners have already presented twice to the Court of Appeals without success. The Petition should be denied.

B. PETITIONERS ARE SEEKING REVIEW ON AN ISSUE THEY DID NOT PRESENT TO THE COURT BELOW.

Furthermore, this would still not be an appropriate case to test the distinction between "gross negligence" and "intentional misconduct," even if this case actually turned on that distinction. The Petitioners argue that all Union decisions, both ministerial actions involved

in the processing of grievances and "judgment calls" regarding the merits of a grievance, should be reviewed under a "gross negligence" standard. Petitioners complain that the Ninth Circuit's distinction between "ministerial conduct" and decisions in which "a union's judgment . . . is in question" represents a "fundamental injustice." (Petition, p. 28) But the Petitioners never objected to the Ninth Circuit's distinction between ministerial and non-ministerial acts when this case was before that Court.

On the contrary, they embraced the distinction. As the Petitioners summarized their arguments in their opening brief on appeal:

> Plaintiffs say Local 274 breached the duty of fair representation in two distinct ways. First Local 274 failed to do the ministerial act of filing a timely grievance. Second, Local

> 274 conducted a merely perfunctory inquiry into the merits of the grievance. Different legal standards apply to these two charges.

(Brief for Appellants, pp. 18-19; emphasis added). Petitioners then opened their argument with a discussion of the distinction between ministerial and non-ministerial acts which the Ninth Circuit made in Galindo v. Stoody Co., 793 F.2d 1502 (9th Cir. 1985) and applied that distinction to the facts of this case. Petitioners never complained that this distinction was unwise or improper, much less that it represented a "fundamental injustice."

Petitioners are asking this Court to grant *certiorari* to review an issue which they did not raise in the Court below. It is too late for the Petitioners to raise that argument or to attack a distinction which they invited the Court below to

apply. G.D. Searle & Co. v. Cohn, 455 U.S. 404, 412 n.7, 102 S.Ct. 1137, 71 L.Ed.2d 250 (1982); U.S. v. Ortiz, 422 U.S. 891, 898, 95 S.Ct. 2585, 45 L.Ed.2d 623 (1975). Their Petition should be denied on this ground alone.

III

CONCLUSION

The Petition should be denied.

DATED: April 20, 1989

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